

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

RODGER BENJAMIN CLOUD,
Petitioner,

v.

HON. MARGARET L. MAXWELL, JUDGE PRO TEMPORE
OF THE SUPERIOR COURT OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

KATHERINE A. MILLER,
Real Party in Interest.

No. 2 CA-SA 2013-0090
Filed November 27, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c)

Special Action Proceeding
Pima County Cause No. SP20130764

Jurisdiction Accepted; Relief Granted

COUNSEL

Ann Nicholson Haralambie, Attorneys, P.C. , Tucson
By Ann Nicholson Haralambie
Counsel for Petitioner

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Stolar & Pollins, P.L.L.C., Tucson
By Merle L. Stolar
Counsel for Real Party in Interest

DECISION ORDER

Chief Judge Howard authored the decision order of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 In this special action, petitioner Rodger Cloud challenges the respondent judge's denial of his of-right notice of change of judge made pursuant to Rule 6, Ariz. R. Fam. Law P., and Rule 42(f), Ariz. R. Civ. P. In her response to Cloud's special action petition, real-party-in-interest Katherine Miller has not attempted to support the respondent's denial of Cloud's notice of change of judge. Because Cloud has no equally plain, speedy, or adequate remedy by appeal, and because the respondent had no discretion to deny Cloud's notice of change of judge, we accept jurisdiction and grant relief. See Ariz. R. P. Spec. Actions 1(a), (3)(a); *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223-24, 921 P.2d 21, 23-24 (1996).

¶2 The procedural facts are undisputed. Cloud filed a pro se complaint for paternity against Miller, followed by a motion for temporary orders and a motion to shorten time. The respondent judge denied Cloud's motion to shorten time and set a hearing on the motion for temporary orders. Before the scheduled hearing, Cloud filed a notice of change of judge pursuant to Rule 6, Ariz. R. Fam. Law P., and Rule 42(f), Ariz. R. Civ. P. Miller objected,¹ and the respondent denied Cloud's notice. This petition for special action followed.

¹Miller apparently withdrew her objection to Cloud's notice at about the same time Cloud filed her special action petition. At Cloud's request, however, this court stayed the proceedings below.

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¶3 Pursuant to Rule 6, Ariz. R. Fam. Law P., a change of judge in a family law matter is governed by Rule 42(f), Ariz. R. Civ. P. A party “is entitled as a matter of right to a change of one judge and of one court commissioner” absent waiver, that is unless “the party agrees to the assignment” or, “after notice to the parties,” the judge “rules on any contested issue,” “grants or denies a motion to dispose of one or more claims or defenses,” “holds a scheduled conference or contested hearing,” or “trial commences.” Ariz. R. Civ. P. 42(f)(1)(A), (D).

¶4 Relevant here, an of-right notice of change of judge must be filed sixty “or more days before the date set for trial.” Ariz. R. Civ. P. 42(f)(1)(C). The notice must contain a certification “that (i) the notice is timely, (ii) the party has not waived the right under subsection (f)(1)(D) of the rule, and (iii) the party has not previously been granted a change of judge as a matter of right in the case.” Ariz. R. Civ. P. 42(f)(1)(A).

¶5 Nothing in the record before us suggests a trial date had been set in this case when the respondent judge denied Cloud’s notice. “[A] ‘judicial proceeding’ in the form of an order to show cause hearing is [not] the same as a ‘trial’ for purposes of interpreting the time limitations of Rule 42(f).” *Mann v. Superior Court*, 183 Ariz. 586, 588, 905 P.2d 595, 597 (App. 1995). Thus, Cloud’s notice was timely filed. Ariz. R. Civ. P. 42(f)(1)(C). And Cloud’s notice contained the certification required by Rule 42(f)(1)(A). Moreover, we agree with Cloud that the sole ruling by the respondent—the denial of Cloud’s motion to shorten time—does not constitute waiver by Cloud of his right to a change of judge under Rule 42(f)(1)(D) because the respondent’s ruling is not dispositive of any contested issue in the case and disposed of no claim or defense. *See Dudley v. Superior Court*, 123 Ariz. 80, 81-82, 597 P.2d 983, 984-85 (1979) (ruling on merits necessarily involves “‘significant legal rights’” not “‘technicalities relating to only procedure or form’”), *quoting Nw. Airlines, Inc. v. State ex rel. N.D. Bd. of Equalization*, 244 N.W.2d 708, 710 (N.D. 1976).

¶6 Finally, we observe that although nothing in the record suggests Cloud served the notice on the presiding judge as required by Rule 42(f)(1)(B), Ariz. R. Civ. P., we find no authority suggesting

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that fact would justify the respondent judge's decision to deny the notice, rather than transfer it to the presiding judge for reassignment. *Cf. Dunn ex rel. Dunn v. Superior Court*, 160 Ariz. 311, 316, 772 P.2d 1164, 1169 (App. 1989) (presiding judge required to reassign case "upon transfer from the trial judge"). Notably, the rule permits an "informal request for change of judge," Ariz. R. Civ. P. 42(f)(1)(A), suggesting that a party's failure to comply with formal requirements—such as service on the presiding judge—does not justify denial of a notice. Accordingly, relief on special action is appropriate because the respondent had no discretion to deny Cloud's request for change of judge. *See* Ariz. R. Civ. P. 42(f)(1)(A); Ariz. R. P. Spec. Actions 3(a).

¶7 The respondent judge's order denying Cloud's notice of change of judge is vacated, and the respondent is directed to transfer the notice to the presiding judge for reassignment. Ariz. R. Civ. P. 42(f)(1)(F). Cloud and Miller each request that we award attorney fees and costs pursuant to Rule 4(g), Ariz. R. P. Spec. Actions, and A.R.S. § 25-324(A). Neither party has provided this court with financial resource information justifying an award of costs or fees pursuant to § 25-324(A); the parties' respective requests therefore are denied. *See Leathers v. Leathers*, 216 Ariz. 374, ¶ 22, 166 P.3d 929, 934 (App. 2007) (appellate court "require[d] to examine both the financial resources and the reasonableness of the positions of each party" under § 25-324(A)).